Zhicay v 116 Wilbur Place, LLC
2019 NY Slip Op 30887(U)
April 3, 2019
Supreme Court, Suffolk County
Docket Number: 15929/2014
Judge: William B. Rebolini

[* 1]

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Nelly Zhicay,

Plaintiff,

-against-

116 Wilbur Place, LLC,
Communications Wireless Group, LLC
d/b/a CWG, Global Electronics Group, LLC,
and Cellular Distributor, Inc.,

Defendants.

Motion Sequence No.: 002; MOTD
Motion Date: 6/6/18
Submitted: 9/12/18

Index No.: 15929/2014

Attorney for Plaintiff:

Keegan & Keegan, Ross & Rosner, LLP
147 North Ocean Avenue
P.O. Box 918
Patchogue, NY 11772

Attorney for Defendant Cellular Distributor, Inc.:

Morris Duffy Alonso & Faley
2 Rector Street, 22nd Floor
New York, NY 10006

Clerk of the Court

Attorney for Defendant 116 Wilbur Place, LLC, Communications Wireless Group, LLC d/b/a CWG, Global Electronics Group, LLC:

Cullen and Dykman LLP
44 Wall Street
New York, NY 10005

Upon the following papers read on this motion by defendants 116 Wilbur Place, LLC, and Communications Wireless Group, LLC, d/b/a CWG for an order granting them summary judgment dismissing the complaint and cross-claims asserted against them pursuant to CPLR 3212: Notice of Motion and supporting papers dated May 9, 2018 and Exhibits A through T annexed thereto; Affirmation in Opposition of defendant Cellular Distributors, Inc. dated July 3, 2018; Affirmation in Opposition of plaintiff dated June 27, 2018 and Exhibit A annexed thereto; Reply Affirmation of defendants 116 Wilbur Place, LLC, and Communications Wireless Group, LLC, d/b/a CWG dated September 11, 2018; it is

ORDERED that the motion by defendants 116 Wilbur Place, LLC, and Communications Wireless Group, LLC, d/b/a CWG for summary judgment dismissing the complaint and cross-claims

against them is granted in part and denied in part, as set forth more fully herein.

This action was commenced on August 13, 2014 by the filing of a summons and complaint seeking damages for personal injuries allegedly sustained by plaintiff Nelly Zhicay on August 18, 2011, when she inhaled toxic fumes during the course of her employment. Plaintiff alleges that Tri-State Staff Solutions assigned her to work for defendant Communications Wireless Group ("CWG") on August 18, 2011, which business was located in a building owned by defendant 116 Wilbur Place, LLC ("Wilbur"). Issue was joined by defendants CWG and Wilbur on October 31, 2014 by the filing of a verified answer. Plaintiff served her verified bill of particulars on November 18, 2014. Plaintiff served and filed a supplemental summons and verified amended complaint dated November 13, 2014 after leave was granted to plaintiff by order of this Court dated March 23, 2015. Plaintiff alleges her injuries were caused when an employee of defendant Cellular Distributor, Inc. ("CDI") spilled a cleansing agent and deposited the materials used to clean-up the spill in a trash receptacle at or near the area where other employees were situated. Plaintiff further allege that defendants were negligent in, among other things, in allowing the release of noxious gases, fumes, and harmful toxins and chemicals to enter the air, failing to provide proper ventilation, and failing to provide proper safety equipment. CDI, as an additional named defendant, served its answer on May 15, 2015. Wilbur and CWG served their answer on May 4, 2015. Plaintiff filed her note of issue on January 9, 2018.

Defendants Wilbur and CWG now move for an order granting them summary judgment dismissing plaintiff's claims and any cross-claims asserted against them, arguing that plaintiff's claims are barred by Workers' Compensation Law and that they did not have a duty to plaintiff. In support of the motion, they submit, among other things, copies of the pleadings, the bill of particulars, a letter by Lina Garcia, the affidavits of Charles Taylor and Christine Tracey, and the transcripts of the deposition testimony of plaintiff, Stephen Smith, Edwin Guantic, and Charles Taylor. The Court notes that Ms. Garcia's unsworn letter is not in admissible form and was not considered in the determination of the motion (*see* ***Currie v Wilhouski***, 93 AD3d 816, 941 NYS2d 218 [2d Dept 2012]; *see generally* CPLR 3212; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In opposition, defendant CDI argues that triable issues of fact remain as to whether plaintiff was also CDI's special employee, whether defendants Wilbur and CWG owed plaintiff a duty to provide adequate protection from hazardous fumes, and whether CWG had a duty to provide masks and training. Also in opposition, plaintiff argues that triable issues of fact remain as to whether Wilbur owed a duty to maintain the premises in a safe condition and whether she was a special employee. Plaintiff submits, in opposition, her affidavit and an attorney affirmation. Defendants Wilbur and CWG submit in reply an attorney affirmation.

According to the submissions, plaintiff was an employee of Tri-Star Staffing Solutions and on August 18, 2011, she was sent to work at CWG refurbishing cellular phones, which was located at a building owned by Wilbur. CWG shared work space with defendant CDI, which refurbished cellular phone batteries. The companies' work spaces were separated by markings on the floor. On the day of the incident, a CDI employee spilled a cleaning product called Lemon 8 on a table. The spill was cleaned up using a rag that had other chemicals on it, which was then thrown into a nearby trash bin. The mixture of chemicals emitted noxious fumes, causing plaintiff's alleged injuries.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

"Workers' Compensation Law §§ 11 and 29 (6) provide that an employee who is entitled to receive compensation benefits may not sue his or her employer in an action at law for the injuries sustained" (***Pena v Automatic Data Processing***, 73 AD3d 724, 724, 900 NYS2d 393 [2d Dept 2010]; *see* ***Fajardo v Mainco El. & Elec. Corp.***, 143 AD3d 759, 40 NYS3d 121 [2d Dept 2016]). "[A] person may be deemed to have more than one employer for purposes of the Workers' Compensation Law, a general employer and a special employer" (***Kramer v NAB Constr. Corp.***, 250 AD2d 818, 818-819, 671 NYS2d 1015 [2d Dept 1998]; *see* ***Munion v Trustees of Columbia Univ. in City of N.Y.***, 120 AD3d 779, 991 NYS2d 460 [2d Dept 2014]; ***Slikas v Cyclone Realty***, 78 AD3d 144, 908 NYS2d 117 [2d Dept 2010]). "The receipt of workers' compensation benefits from a general employer precludes an employee from commencing a negligence action against a special employer" (***Hofweber v Soros***, 57 AD3d 848, 849, 870 NYS2d 98 [2d Dept 2008]; *see* ***Fajardo v Mainco El. & Elec. Corp.***, *supra*; ***Munion v Trustees of Columbia Univ. in City of N.Y.***, *supra*; ***Gaynor v Cassone Leasing***, 79 AD3d 967, 914 NYS2d 241 [2d Dept 2010]; ***Franco v Kaled Mgt. Corp.***, 74 AD3d 1142, 903 NYS2d 512 [2d Dept 2010]).

> A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer.

(***Thompson v Grumman Aerospace Corp.***, 78 NY2d 553, 557, 578 NYS2d 106 [1991] [citation omitted]; *see* ***Abreu v Wel-Made Enters., Inc.***, 105 AD3d 878, 964 NYS2d 198 [2d Dept 2013]; ***Slikas v Cyclone Realty***, *supra*; ***Samuel v Fourth Ave. Assoc.***, 75 AD3d 594, 906 NYS2d 67 [2d Dept 2010]; ***Franco v Kaled Mgt. Corp.***, *supra*).

Further, in determining whether a special employment relationship exists, a court should consider factors such as the right to control the employee's work, the method of payment, the furnishing of equipment or tools, the right to discharge the employee, and whether the work being performed was in the furtherance of the general employer's or special employer's business (***Schramm v Cold Spring Harbor Lab.***, 17 AD3d 661, 793 NYS2d 530 [2d Dept 2005]; ***Pena v***

Automatic Data Processing, *supra*; ***Slikas v Cyclone Realty***, *supra*; ***Franco v Kaled Mgt. Corp.***, *supra*). Of those factors, the most significant is who controls and directs the manner, details, and ultimate result of the employee's work (*see* ***Thompson v Grumman Aerospace Corp.***, *supra*; ***Digirolomo v Goldstein***, 96 AD3d 992, 947 NYS2d 164 [2d Dept 2012]). A person's status as a special employee is generally a question of fact, but may be determined as a matter of law where particular, undisputed critical facts compel the conclusion that there is no triable issue of fact (*see* ***Pena v Automatic Data Processing***, *supra*; ***Slikas v Cyclone Realty***, *supra*; ***Franco v Kaled Mgt. Corp.***, *supra*; ***Weitz v Anzek Constr. Corp.***, 65 AD3d 678, 885 NYS2d 314 [2d Dept 2009]). "Only where the defendant is able to demonstrate conclusively that it has assumed exclusive control over the manner, details and ultimate result of the employee's work is summary adjudication of special employment status and consequent dismissal of an action proper" (***Bellamy v Columbia Univ.***, 50 AD3d 160, 162, 851 NYS2d 406, 408 [1st Dept 2008] [internal citation omitted]).

CWG established its prima facie entitlement to summary judgment dismissing the complaint against it based on the exclusivity provisions of the Workers' Compensations Law, as it demonstrated that plaintiff was its special employee (*see* ***Weitz v Anzek Constr. Corp.***, *supra*; ***Roberson v Moveway Transfer and Stor.***, 44 AD3d 839, 843 NYS2d 435 [2d Dept 2007]; ***Bailey v Montefiore Med. Ctr.***, 12 AD3d 545, 784 NYS2d 383 [2d Dept 2004]; ***Niranjan v Airweld, Inc.***, 302 AD2d 572, 755 NYS2d 640 [2d Dept 2003]; ***Vanderwerff v Victoria Home***, 299 AD2d 345, 749 NYS2d 75 [2d Dept 2002]). The evidence established that, at the time of the incident, plaintiff was employed and paid by Tri-Star Staffing Solutions, but that she was working under the supervision and direction of CWG, and performed work in furtherance of CWG's business. In addition, CWG controlled plaintiff's hours of work, the method, manner, and details of the work she was to accomplish, and provided the equipment she was to use in furtherance of her job. Since plaintiff has failed to come forth with evidence showing that CWG did not determine the manner, details, and ultimate result of plaintiff's work, including, but not limited to, the control, direction, supervision, and furnishing of equipment, it has failed to show that a material issue of fact exists sufficient to require a trial on the issue of her status as a "special employee." Therefore, that portion of the motion dismissing the complaint against CWG is granted.

As to the application for summary judgment dismissing the complaint against Wilbur, the mere happening of an accident, in and of itself, does not establish the liability of a defendant (*see* ***Scavelli v Town of Carmel***, 131 AD3d 688, 15 NYS3d 214 [2d Dept 2015]). To establish a prima facie case of negligence under the common law, a plaintiff must demonstrate the existence of duty owed by defendant to plaintiff, a breach of that duty, and resulting injury which was proximately caused by the breach (*see* ***Pasternack v Lab. Corp. of Am. Holdings***, 27 NY3d 817, 825, 37 NYS3d 750 [2016]; ***Greenberg, Trager & Herbst, LLP v HSBC Bank USA***, 17 NY3d 565, 934 NYS2d 43 [2011]; ***Mendez-Canales v Agnelli Macchine S.R.L.***, 165 AD3d 646, 85 NYS3d 188 [2d Dept 2018]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003];***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Cupo v Karfunkel***, 1 AD3d 48, 51, 767 NYS2d 40 [2d Dept 2003]). To make a prima facie showing on a summary judgment motion,

a defendant must establish that it neither created nor had actual or constructive notice of the dangerous condition (*see* ***Lococo v Mater Cristi Catholic High Sch.***, 142 AD3d 590, 37 NYS3d 134 [2d Dept 2016]; ***Witkowski v Island Tree Pub. Lib.***, 125 AD3d 768, 4 NYS3d 65 [2d Dept 2015]; ***Guzman v Jewish Bd. of Family and Children's Servs., Inc.***, 103 AD3d 776, 960 NYS2d 151 [2d Dept 2013]). To constitute constructive notice, a dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Toma v Rizkalla***, 138 AD3d 1103, 30 NYS3d 321 [2d Dept 2016]; ***Willis v Galileo Cortlandt, LLC***, 106 AD3d 730, 964 NYS2d 576 [2d Dept 2013]; ***Guzman v Jewish Bd. of Family and Children's Servs., Inc.***, *supra*). "Although a jury determines whether and to what extent a particular duty was breached, it is for the court to first determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally" (***Cupo v Karfunkel***, *supra*, quoting ***Tagle v Jakob***, 97 NY2d 165, 168, 737 NYS2d 331 [2001]). Whether a dangerous condition exists on real property generally is an issue to be determined by the jury based on the unique facts of each case (***Elfassi v. Hollister Co.,*** 167 AD3d 569, 88 NYS3d 505 [2d Dept. 2018]; ***DeLaRosa v City of New York***, 61 AD3d 813, 877 NYS2d 439 [2d Dept 2009]; *see* ***Trincere v County of Suffolk***, 90 NY2d 976, 977, 655 NYS2d 615 [1997]).

Here, defendant Wilbur failed to establish a prima facie case of entitlement to summary judgment dismissing the complaint against it. Indeed, Wilbur, as the owner of the building, had a duty to maintain the premises in a reasonably safe condition (***see Peralta v Henriquez***, *supra*; ***Nallan v Helmsley-Spear, Inc.***, *supra*; ***Basso v Miller***, *supra*). By the deposition testimony of Stephen Smith, it is clear that Wilbur had knowledge of the business that would be conducted in the building when it was acquired and the layout was designed. As Wilbur knew of the general business practices that were occurring at the time of the incident, Wilbur had a duty to provide proper ventilation, but failed to submit evidence that its ventilation system was appropriate for the building's usage.

As to the portion of the motion for summary judgment dismissing the cross-claims against them, CWG and Wilbur failed to eliminate all triable issues of fact (*see* ***Aberman v Retail Prop. Trust***, 92 AD3d 703, 938 NYS2d 347 [2d Dept 2012]). The right to contractual indemnification "depends upon the specific language of the contract, [and] [t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (***Shaughnessy v Huntington Hosp. Assn.***, 147 AD3d 994, 999-1000, 47 NYS3d 121 [2d Dept 2017] [internal citations and quotations omitted]; *see* ***Castillo v Port Auth. of New York & New Jersey***, 159 AD3d 792, 72 NYS3d 582 [2d Dept 2018]; ***Bleich v Metropolitan Mgt., LLC***, 132 AD3d 933, 19 NYS3d 527 [2d Dept 2015]). However, as no contracts were submitted in support of the motion, summary judgment on the cross-claim seeking contractual indemnification is denied.

To establish a claim for common law indemnification, a party must prove that it was not negligent and that the indemnitor was responsible for the negligence that contributed to the accident, or, in the absence of negligence, had the authority to direct, supervise, and control the work that gave rise to the injury (*see* ***Shaughnessy v Huntington Hosp. Ass'n***, 147 AD3d 994, 47 NYS3d 121 [2d Dept 2017]; ***Mohan v Atlantic Court, LLC***, 134 AD3d 1075, 24 NYS3d 102 [2d Dept 2015]). Here,

CWG and Wilbur failed to establish prima facie entitlement to summary judgment dismissing the cross-claims against them, as they did not demonstrate that they were free from negligence (*see* ***Dow v Hermes Realty, LLC***, 155 AD3d 824, 63 NYS3d 698 [2d Dept 2017]; ***Holub v Pathmark Stores, Inc.***, 66 AD3d 741, 887 NYS2d 215 [2d Dept 2009]; ***George v Marshalls of MA, Inc.***, *supra*). Therefore, summary judgment on the cross-claim seeking common law indemnification is premature.

Accordingly, the motion by defendants Wilbur and CWG for summary judgment dismissing the complaint and cross-claims against them is granted in part and denied in part.

Dated: 4/3/2019

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**